

**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

UNITED STATES OF AMERICA,

)

Plaintiff,
vs.

Case No.: 2:16-cr-00323-GMN-VCF

JIMMY L. NOEL,

)

Defendant.

)

ORDER

Pending before the Court is Defendant Jimmy L. Noel's ("Defendant's") Motion for

Compassionate Release, (ECF No. 67). The Government filed a Response, (ECF No. 72), and Defendant did not file a reply.

Also pending before the Court is Defendant's Motion for Reconsideration, (ECF No. 73), of the Court's Minute Order denying Defendant's Motion for Appointment of Counsel, (ECF No. 69).

For the reasons discussed below, the Court **DENIES** Defendant's Motions.

I. BACKGROUND

On May 24, 2018, the Court sentenced Defendant to 66-months custody followed by 24-months supervised release after Defendant pleaded guilty to two counts of bank robbery in violation of 18 U.S.C. § 2113(a), two counts of bank robbery in violation of 18 U.S.C. §§ 2113(a) and 3147, and one count of interference with commerce by robbery in violation of 18 U.S.C. §§ 1951 and 3147. (See Superseding Information, ECF No. 54); (J., ECF No. 66). Defendant now petitions this Court for compassionate release. (See *generally* Mot. Compassionate Release (“MCR”), ECF No. 67).

Concurrently with his Motion for Compassionate Release, Defendant filed a Motion for Appointment of Counsel. (See Mot. Appoint. Counsel, ECF No. 68). The Court denied

1 Defendant's Motion as moot because the Court appoints the Federal Public Defender's Office
 2 ("FPD") to review all motions for compassionate release, after which the FPD either files a
 3 supplement to the motions or a notice of non-supplementation depending on the FPD's
 4 assessment of the motions' merit. (*See* Min. Order, ECF No. 69); (Gen. Order 2020-06). After
 5 the FPD did not timely file either document, the Court directed the FPD to comply with
 6 General Order 2020-06 by filing a supplement or notice of non-supplementation to Defendant's
 7 Motion. (*See* Min. Order, ECF No. 70). The FPD then filed a Notice of Non-Supplementation
 8 after finding no supplement necessary. (*See* Notice, ECF No. 71).

9 **II. LEGAL STANDARD**

10 The compassionate release provision of 18 U.S.C. § 3582(c)(1)(A), as amended by the
 11 First Step Act, Pub. L. No. 115-391, 132 Stat. 5194 (Dec. 21, 2018), authorizes the sentencing
 12 court to modify a defendant's sentence in limited circumstances. 18 U.S.C. § 3582(c)(1)(A).
 13 Generally, to be eligible for compassionate release, a defendant must demonstrate: (1) he has
 14 exhausted his administrative remedies; (2) "extraordinary and compelling reasons" warrant a
 15 reduction in his sentence, and (3) he is not "a danger to the safety of any other person or the
 16 community." 18 U.S.C. § 3582(c)(1)(A); USSG § 1B1.13. Under United States Sentencing
 17 Guideline § 1B1.13, "extraordinary and compelling reasons" include, among other things,
 18 terminal illnesses and medical conditions "that substantially diminish[] the ability of the
 19 defendant to provide self-care within the environment of a correctional facility and from which
 20 he or she is not expected to recover." USSG § 1B1.13. The court may also consider "other
 21 reasons" including a "reason other than, or in combination with" a reason specifically provided
 22 in the Sentencing Guidelines. *Id.* The decision to grant compassionate release is in the
 23 sentencing court's discretion. *See United States v. Wade*, 2:99-CR-00257-CAS-3, 2020 U.S.
 24 Dist. LEXIS 65373, 2020 WL 1864906, at *5 (C.D. Cal. Apr. 13, 2020).

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1 **III. DISCUSSION**

2 Defendant argues that the spread of COVID-19 through FCI Sandstone, in combination
 3 with Defendant's underlying medical conditions—"heavy smoking history, weight, & BMI,
 4 neurological & psychological conditions, plus numerous health conditions from prior history of
 5 excessive drug use"—provide "extraordinary and compelling reasons" for his release from
 6 custody. (MCR ¶¶ 1–5, ECF No. 67). The Government responds that the Court should deny
 7 Defendant's Motion because: (1) Defendant has not met his burden to show that he exhausted
 8 his administrative remedies; (2) Defendant's underlying medical conditions do not provide
 9 extraordinary and compelling reasons for relief; and (3) a sentencing reduction is not warranted
 10 under the § 3553 factors because bank robbery is a crime of violence under 18 U.S.C. §
 11 924(c)(3)(A). (Resp. MCR 5:1–10:10, 13:17–14:5, ECF No. 72).

12 **a. Exhaustion of Administrative Remedies**

13 The parties dispute whether Defendant has exhausted his administrative remedies.
 14 Defendant claims to have requested compassionate release from the warden of FCI Sandstone
 15 on June 30, 2020, which was denied by non-response. (MCR ¶ 9). The Government responds
 16 that the Bureau of Prisons ("BOP") has no record that Defendant made any request for
 17 compassionate release, so he has not met his burden to show he has exhausted his
 18 administrative remedies, which deprives the Court of jurisdiction over the Motion. (Gov't's
 19 Resp. 4:1–16).

20 Courts within this District have consistently held that the exhaustion requirement is
 21 mandatory and jurisdictional, and this Court finds their reasoning persuasive. *United States v.*
 22 *Rojas-Guzman*, No. 3:10-cr-00109-RCJ-WGC, 2020 U.S. Dist. LEXIS 82101, 2020 WL
 23 2323061, at *1 (D. Nev. May 11, 2020); *United States v. Cooper*, No. 2:14-cr-00228-JAD-
 24 CWH, 2020 U.S. Dist. LEXIS 74903, 2020 WL 2064066, at *2–*3 (D. Nev. Apr. 29, 2020);
 25 *United States v. Cardenas*, No. 2:11-cr-00414-APG-CWH, 2020 U.S. Dist. LEXIS 74909, at

1 *1-*3 (D. Nev. Apr. 29, 2020); *United States v. Mogavero*, No. 2:15-cr-00074-JAD-NJK, 2020
 2 U.S. Dist. LEXIS 64623, 2020 WL 1853754, at *2 (D. Nev. Apr. 13, 2020). Defendant
 3 presents only arguments, but not evidence, that he requested compassionate release from the
 4 warden. *See United States v. Zermenio*, 66 F.3d 1058, 1062 (9th Cir. 1995) (“The government’s
 5 assertions in its pleadings are not evidence.”); *S. Pac. Co. v. Conway*, 115 F.2d 746, 750 (9th
 6 Cir. 1940) (“[T]he office of a pleading is to state ultimate facts and not evidence of such
 7 facts.”). Therefore, the Court finds that Defendant has failed to meet his burden to show that
 8 the Court has jurisdiction because he has failed to provide evidence that he has exhausted his
 9 administrative remedies. Even if Defendant were able to show he has exhausted his
 10 administrative remedies, he has not met his burden to show that his underlying medical
 11 conditions provide extraordinary and compelling reasons for his release.

12 **b. Extraordinary and Compelling Reasons**

13 Defendant argues that his “heavy smoking history, weight, & BMI, neurological &
 14 psychological conditions, plus numerous health conditions from prior history of excessive drug
 15 use” provide “extraordinary and compelling reasons” for his release from custody because they
 16 increase his risk of severe complications from COVID-19. (MCR ¶¶ 1–5). The Government
 17 argues that Defendant has not met his burden to show he has underlying health conditions that
 18 increase his risk of contracting severe complications from COVID-19. (Resp. MCR 7:21–
 19 10:10).¹ The Court finds that there is little evidence to support Defendant’s contention that he
 20 is at increased risk for heightened complications from COVID-19.

21 The Centers for Disease Control (“CDC”) maintain a list of underlying medical
 22 conditions that increase an individual’s risk of contracting severe illness from COVID-19. *See*
 23 CDC, “Coronavirus Disease 2019 (COVID-19): People with Certain Medical Conditions,”

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25 ¹ While Defendant indicates his weight and BMI increase his risk of complications, his Motion for
 Reconsideration indicates that he is underweight, which is not a COVID-related risk factor identified by the
 CDC. (See Mot. Reconsideration at 3, ECF No. 73).

1 <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-with-medical->
 2 conditions.html, (Oct. 16, 2020). While most of Defendant's alleged underlying medical
 3 conditions are not listed, the CDC now counts a previous history of smoking as a condition that
 4 medical evidence shows increases the risk of severe illness from COVID-19. *Id.*² Federal
 5 district courts are divided regarding whether a history of smoking can provide extraordinary
 6 and compelling reasons for relief during the pandemic. *Compare United States v. Galaz*, No.
 7 15-cr-02558-GPC, 2020 U.S. Dist. LEXIS 141362, 2020 WL 4569125, at *4 (S.D. Cal. Aug. 7,
 8 2020) (collecting cases finding that a history of smoking supports compassionate release); *with*
 9 *United States v. Blinks*, No. 1:17-CR-0248, 2020 U.S. Dist. LEXIS 163771, 2020 WL 5366728,
 10 at *2 (E.D. Cal. Sept. 8, 2020) (collecting cases finding the contrary)).

11 The Court need not conclude whether the risk of exposure to COVID-19 combined with
 12 a history of heavy smoking provides extraordinary and compelling reasons for release because
 13 Defendant has not met his burden to provide evidence that he has a history of smoking.
 14 Defendant cannot merely assert that he has conditions that place him at heightened risk for
 15 contracting COVID-19 complications, he must provide the Court with evidence corroborating
 16 his claims to satisfy his burden. *United States v. Greenhut*, 2:18-CR-00048, 2020 U.S. Dist.
 17 LEXIS 17139, 2020 WL 509385, at *1 (C.D. Cal. Jan. 31, 2020) (citing *United States v.*
 18 *Sprague*, 135 F.3d 1301, 1306-07 (9th Cir. 1998)). As the Government highlights, Defendant's
 19 PSR does not corroborate any of his alleged underlying medical conditions. (Resp. MCR 8:4-7,
 20 8:15-18); (PSR ¶¶ 91-98). Accordingly, because Defendant has not satisfied his burden to
 21 show he is eligible for compassionate release, the Court denies the Motion without prejudice.³

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23 ² The Government cites an old version of the same list, based on now-outdated medical evidence, indicating that
 24 a history of smoking's effect on the risk of COVID-complications is inconclusive. (Resp. MCR 8:4-14).

25 ³ Defendant asks that the Court construe his Motion for Reconsideration as a late-filed reply. (See Mot.
 Reconsider at 10). Even if the Court grants Defendant's request, he provides no evidence in the attempted Reply
 that would satisfy his burden.

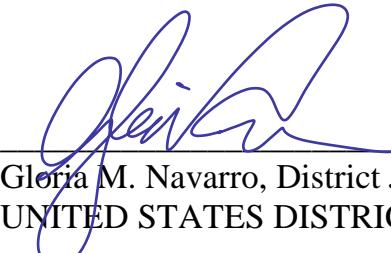
1 Given that the Motion for which Defendant sought assistance of counsel has been resolved,
2 Defendant's Motion for Reconsideration regarding his request for counsel to file the Motion is
3 now moot.

4 **IV. CONCLUSION**

5 **IT IS HEREBY ORDERED** that Defendant's Motion for Compassionate Release,
6 (ECF No. 67), is **DENIED without prejudice**.

7 **IT IS FURTHER ORDERED** that Defendant's Motion for Reconsideration, (ECF No.
8 73), is **DENIED as moot**.

9 Dated this 5 day of November, 2020.

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Gloria M. Navarro, District Judge
14 UNITED STATES DISTRICT COURT
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